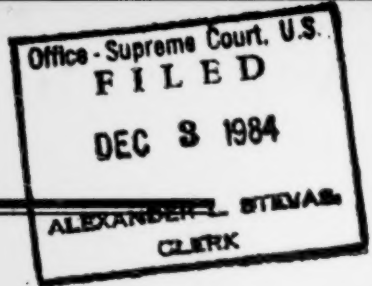


No. 84-700



IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

WEST MICHIGAN BROADCASTING COMPANY,
Petitioner,
v.
FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Respondents.

**WATERS BROADCASTING CORPORATION
BRIEF IN OPPOSITION**

**ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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QUESTION PRESENTED FOR REVIEW

Whether the Federal Communications Commission erred in a comparative hearing to select the permittee of a new FM broadcast station, when it: (1) awarded a comparative "plus" to a black, female applicant who proposed to operate the station personally on a full time basis; and (2) considered the "plus" along with other factors when it weighed the pertinent attributes presented by both applicants for the facility?

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STATEMENT OF THE CASE

This case involves a unanimous decision of the Court of Appeals for the District of Columbia Circuit affirming a decision in a routine, comparative hearing conducted by the Federal Communications Commission ("FCC"). Petitioner West Michigan Broadcasting Company ("West Michigan") seeks to invoke this Court's jurisdiction in an attempt to overturn the FCC's selection of Respondent Waters Broadcasting Corporation ("Waters") as the licensee for a new FM broadcast station in Hart, Michigan.

Using long-established criteria based on the principles of promoting a diversity of viewpoints and best practicable service to the public primarily by encouraging local ownership and operation of the proposed station, the FCC examined the proposals submitted by West Michigan and Waters. Both applicants proposed to "integrate" ownership and management; i.e., both proposed to operate their stations personally. Neither applicant owned other broadcast facilities. West Michigan received a "substantial" credit for the local residence and civic participation of its stockholders and credit for the fact that a 24% female stockholder would participate in station operations. Waters received a "moderate" credit for Mrs. Waters' residence and civic participation in the service area of the station (but outside the community of license) and a "substantial" credit for the fact that Nancy Waters, Waters' sole stockholder, is a black female. After weighing the various credits accumulated by each applicant, the Commission selected Waters.¹

¹ The detailed history of the case is as follows: The Administrative Law Judge found that West Michigan's proposal to integrate owners into management was not well defined. *Waters Broadcasting Corp.*, 88 F.C.C.2d 1213, 1219 (A.L.J. 1981). In contrast, the Judge found that

Pursuant to 47 U.S.C. § 402(b) (1976), West Michigan appealed the Commission's decision to the United States Court of Appeals for the District of Columbia Circuit. West Michigan argued that the FCC erred in awarding Waters a "moderate" credit for Mrs. Waters' residency and civic activities and erred in awarding Waters a "substantial" credit for Nancy Waters' race because very few blacks live in Hart, Michigan—the community of license. *West Michigan Broadcasting Co. v. FCC*, 735 F.2d 601, 603 (D.C. Cir. 1984). West Michigan also argued that the awarding of a "plus" for minority ownership in a comparative proceeding violated the constitutional principle of equal protection under the law. *Id.* at 613.²

Nancy Waters "exhibited an understanding of her proposal, an awareness of the community, and understood how she would function at the station." *Id.* at 1220. The Judge favored Waters on qualitative grounds because of her superior knowledge of Hart and her ability to articulate her involvement in the operation of the proposed station. *Id.* at 1221. He also favored Waters on qualitative grounds because of Nancy Waters' race and gender. *Id.* The Review Board reversed the Judge and granted the construction permit to West Michigan. *Waters Broadcasting Corp.*, 88 F.C.C.2d 1204 (Rev. Bd. 1981). The Board gave Waters a lesser credit for her residence and civic activities within the service area of the station, *id.* at 1210, and concluded that the case presented a choice between local residence (West Michigan) and minority ownership and management (Waters). *Id.* at 1211. The Board determined, all else being equal, that local residency should be accorded greater weight than minority ownership. *Id.* at 1211-12. On review, the Commission reversed the Board and concluded that the qualitative weight of Nancy Waters residency and civic activities should be classified as "moderate" and found that on balance of all factors, Waters' application contained the better proposal. *Waters Broadcasting Corp.*, 91 F.C.C.2d 1260, 1266-67 (1982).

² West Michigan did not, however, attack the award of the "plus" for female ownership and operation which was awarded to both West Michigan (24% female ownership) and Waters (100% female ownership).

On the administrative law issues, the Court below found that the award of a "moderate" credit to Waters for Nancy Waters' residency and civic participation outside of Hart but within the service area of the station was a change in policy. *Id.* at 608. Nevertheless, the Court sustained the action because the Commission had given "reasons" for the change, *id.*, and because the decision was not "inconsistent with those cases that discuss the primary importance of a licensee's duty of service to the community of license." *Id.*³ The Court found that a credit for Waters' minority ownership and management was properly awarded even though very few blacks live in Hart. *Id.* at 609-13. The Court found that other FCC policies which encourage minority ownership were not premised on a "nexus" between the composition of the audience and the licensee of the station. *Id.* at 611-12.⁴

³ The Court noted that Waters received only a "moderate" credit for Waters' residency and civic participation within the station's service area while West Michigan was awarded a "substantial" credit for its stockholders' residency and civic participation in Hart itself. *West Michigan Broadcasting Co. v. FCC*, 735 F.2d 601, 608 (D.C. Cir. 1984).

⁴ For instance, the Commission has a policy of awarding tax benefits to licensees who sell broadcast properties to minority owners. *Minority Ownership of Broadcasting Facilities*, 68 F.C.C.2d 979, *clarified*, FCC 78-725, released October 11, 1978, 44 Rad. Reg. 2d (P&F) 479 (1978); *Minority Ownership in Broadcasting*, FCC 82-523 released December 13, 1982, 52 Rad. Reg. 2d (P&F) 1301 (1982). It also has a policy that permits owners to sell to minorities rather than go through a revocation hearing or a renewal hearing containing qualifying issues. *Minority Ownership of Broadcasting Facilities*, 68 F.C.C.2d at 983. The Commission also awarded a merit to prospective minority owners when it broke down the AM radio clear channels in 1980. *See Clear Channel AM Broadcasting*, 78 F.C.C.2d 1345, 1368, *recon.*, 83 F.C.C.2d 216 (1980), *aff'd sub nom. Loyola University v. F.C.C.*, 670 F.2d 1222 (D.C. Cir. 1982).

The Court also found that the awarding of a merit in comparative selection proceedings to minority owners who proposed to operate their stations personally was consistent with the seminal case in the area, *TV 9, Inc. v. FCC*, 495 F.2d 929 (D.C. Cir. 1973), *cert. denied*, 419 U.S. 986 (1974), and with prior Commission precedent. *West Michigan Broadcasting Co. v. FCC*, 735 F.2d at 611. Finally, the Court found that the recent establishment of statutory lottery procedures with minority preferences to be used in awarding broadcast licenses evidenced Congressional approval of the Commission's policy. *Id.* at 612-13.⁵

On the constitutional issue, the Court found the Commission's policy to be within the constitutional boundaries set forth in *University of California Regents v. Bakke*, 438 U.S. 265 (1978) and *Fullilove v. Klutznick*, 448 U.S. 448 (1980).⁶ The Court reasoned that the FCC's minority policy compared favorably to the "Harvard Plan" discussed in *Bakke* and to the remedial set-aside program found lawful in *Fullilove*:

First, the Commission's award of minority enhancements is not a grant of any given number of permits to minorities or a denial to qualified nonminorities of the ability freely to compete for permits; it is instead a consideration of minority status as but *one factor* in a competitive multi-factor selection system that is designed to obtain a diverse mix of broadcasters. Second, the Commission's action in this case came on

⁵ See Communications Amendments Act of 1982, Pub. L. No. 97-259, 96 Stat. 1087, 1094-1095; 47 U.S.C. §§ 309(i) (3) (A) and (C); H.R. Conf. Rep. No. 765, 97th Cong., 2d Sess. 40-41, 43-46, *reprinted in* 1982 U.S. Code Cong. Ad. News 2261, 2284-85, 2287-90.

⁶ *West Michigan Broadcasting Co. v. FCC*, 735 F.2d at 613-16.

the heels of highly relevant congressional action that showed clear recognition of the extreme underrepresentation of minorities and their perspectives in the broadcast mass media. Congress found that this situation was a part of "the effects of part inequities stemming from racial and ethnic discrimination." H.R. Conf. Rep. No. 97-765, 97th Cong., 2d Sess. 43 (1982), U.S. Code Cong. & Admin. News 1982, p. 2287.

West Michigan Broadcasting Co. v. FCC, 735 F.2d at 613-14 (emphasis in original).

The Court affirmed the Commission in a unanimous opinion. *Id.* at 616. West Michigan sought rehearing *en banc*. That request was denied—again by a unanimous Court. *West Michigan Broadcasting Co. v. FCC*, No. 82-2513 (D.C. Cir. reh'g *en banc* denied Aug. 2, 1984).

SUMMARY OF ARGUMENT

The argument presented by West Michigan is premised on inaccuracies. First, these are minorities residing in Hart, Michigan and even more minorities reside within the service area of the station. Therefore, regardless of whether a "nexus" is required between a minority applicant and the population to be served, such a nexus existed in this case. Second, the FCC considered far more than just race and residency when it decided the case. Third, a plus is not awarded automatically to a minority applicant, but is given only in circumstances which support a reasonable expectation that an increase in the diversity of viewpoints expressed in the electronic media will result.

Once awarded, the plus is considered along with all other relevant criteria in an overall evaluation of each applicant for the facility. The procedures used by the FCC thus are very similar to the admissions program used by

Harvard University which was, in turn, cited with approval by five Justices of this Court. Moreover, the minority policy followed by the FCC was developed carefully over time in a series of court decisions as a remedial measure to help raise the number of minority broadcast licensees. The cases noted that a series of government studies had concluded that societal discrimination had kept the number of minority licensees at an abnormally low level. Finally, the minority plus awarded by the FCC is based on the concept of diversity. Since it is the speaker who determines whether a voice is "new", the FCC properly focused on the characteristics of the applicant and not on the characteristics of the audience to be served.

ARGUMENT

REASONS FOR NOT ISSUING THE WRIT

Contrary to the assertions of West Michigan, this case does not involve novel "issues of communications policy or constitutional law."⁷ The case below was a routine, two-party comparative hearing for a new FM station. The only novel aspect of this case is the tenacity with which West Michigan has sought to overturn the FCC's decision.

Before discussing the merits of West Michigan's legal arguments certain inaccuracies, primarily factual in nature, which permeate West Michigan's Petition, must be corrected.

⁷ Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia at 2, *West Michigan Broadcasting Co. v. FCC*, No. 84-700, filed October 31, 1984. Hereinafter the Petition will be referred to as "West Michigan's Petition."

INACCURACIES IN THE PETITION

1. Minorities Do Not Reside Within The Service Area Of The Station.

The foundation of West Michigan's "nexus" argument is the (erroneous) fact that Hart "has . . . no minority population."⁸ Based on that assumption, West Michigan argues that Nancy Waters' race is irrelevant to "the goal of diversity" because "no one outside the Hart area will hear the station; and any public interest benefits flowing from the race of its owner must be related to that community."⁹

In fact, the record established that the community of Hart has a significant Hispanic population¹⁰ and that a substantial minority population resides within the service area of the station.¹¹ This latter point has special significance because the facility in question is a Class C FM station—the most powerful type of FM station licensed by the FCC. These stations are specifically designed to provide service not only to their communities of license but also to "large surrounding areas."¹² Therefore, without regard to the legal validity of the argument, the factual assumptions underlying West Michigan's "nexus" argument are contrary to the record facts.

2. The FCC Considered Only Place of Residence and Race When It Selected the Hart Permittee.

⁸ *Id.* at 9.

⁹ *Id.*

¹⁰ Tr. 56, 58–59.

¹¹ *Waters Broadcasting Corporation*, 88 F.C.C.2d at 1216.

¹² See 47 C.F.R. § 73.206(b) (4) (1983) (revised 1984); *Revision of FM Rules*, FCC 62-866, released August 1, 1962, 23 Rad. Reg. (P&F) 1801, 1923 (1962).

West Michigan argues in its Petition that “[a]part from Waters’ racial characteristics, the only comparative factor of decisional significance was local residence background.”¹³ This statement is incorrect to the extent that it infers that only race and residency were considered by the Commission. As prescribed by the *Policy Statement on Comparative Broadcast Hearings*, 1 F.C.C.2d 393, *recon. denied*, 1 F.C.C.2d 918 (1965), the FCC considered all relevant aspects of the proposals submitted by West Michigan and Waters.¹⁴ Thus, race and residency were considered as part of a much larger examination—not as isolated factors of singular significance.¹⁵

3. A Merit for Race Is Automatically Awarded To A Minority Applicant.

West Michigan argues that the “constitutional flaw” in the Commission’s policy is that a merit for race is “automatically awarded irrespective of the facts of any given case.”¹⁶ It is this presumption which lends superficial credence to the arguments presented in the Petition and the presumption is false.

¹³ West Michigan’s Petition at 4.

¹⁴ For instance, the Commission examined each application to determine whether it had other broadcast interests. *Waters Broadcasting Corporation*, 88 F.C.C.2d at 1205. It also examined each applicant to determine the extent that it proposed to integrate ownership and management. *Id.* at 1207. Only after these “quantitative” factors were examined did the Commission turn to examine such “qualitative” factors as residency, race and gender. *Id.* at 1208.

¹⁵ The Court below detailed the criteria of selection used in comparative proceedings. *West Michigan Broadcasting Co. v. FCC*, 735 F.2d at 603–607.

¹⁶ West Michigan Petition at 7.

An applicant does not receive the merit by merely proposing to present minority viewpoints in station programming. *TV 9, Inc. v. FCC*, 495 F.2d at 938. The merit is rooted deep in the basic First Amendment principle that numerous and diverse speakers enrich the knowledge and freedom of us all. *Id.* at 937; *WPIX, Inc.*, 68 F.C.C.2d 381, 411 (1978). Therefore, in order to insure that the award of the merit will truly further these important principles, a minority group member must not only be an owner of the proposed facility, but an owner who promises to *participate* actively in the operation of the station. *TV 9, Inc. v. FCC*, 495 F.2d at 938; Supp. Op. at 941. If a minority group member is an owner but will not operate the station, he or she will not be awarded the merit. *Cf. HLD & M Communications*, 93 F.C.C.2d 143 (Rev. Bd. 1983). Conversely, even if a manager, a minority group member must be a *bona fide* owner in order to receive the plus. *See KIST Corp.*, FCC 84R-74, released October 19, 1984, 57 Rad. Reg. 2d (P&F) 49, 60 (Rev. Bd. 1984). There is thus nothing "automatic" about the merit.

**THE AWARD OF A PLUS FOR THE RACE
OF A MINORITY OWNER-OPERATOR IS
LAWFUL IN A COMPARATIVE HEARING
CONDUCTED BY THE FCC**

1. The TV-9 Policy Is Designed To Overcome Past Discrimination and Has Been Approved By Congress.

As discussed above, the "plus" available to a minority applicant under the TV-9 policy is awarded only when the FCC is reasonably certain that the minority group member will, in fact, contribute his unique experiences and perspectives to the "voice" of the broadcast station, thus enriching the intellectual and cultural resources available to the station's audience. Once awarded, the TV-9 plus is

considered as one of many attributes deemed relevant to the selection process.¹⁷ In the case at bar, West Michigan could have been selected over Waters had it proposed a more efficient use of the facility or specialized programming.¹⁸ Nancy Waters' race did not foreclose the selection of West Michigan;¹⁹ West Michigan was not selected because the totality of its proposal was deemed less compelling from a public interest standpoint than the totality of Waters' proposal.

As the Court below found, the weighing process which occurred in this case was quite similar in structure and application to the Harvard University admissions program described by five Justices of this Court as lawful in *University of California Regents v. Bakke*, 438 U.S. at 317, 326 n.1. As in the case below, under the Harvard Plan a minority applicant may receive a plus for his race but the award of the merit does not "insulate the individual from comparison with all other candidates for the available seats."²⁰

In general application, the TV-9 policy also passes constitutional muster because of its remedial nature. The policy evolved after a number of government studies on the effects of racial prejudice concluded that societal discrimination had resulted in a significant underrepresentation of minority group members in the ranks of broadcast licensees. See generally *Citizens Communications Cen-*

¹⁷ *West Michigan Broadcasting Co. v. FCC*, 735 F.2d at 615.

¹⁸ *Waters Broadcasting Corp.*, 91 F.C.C.2d at 1281 n.37 (Statement of Commissioner Rivera).

¹⁹ *Id.*

²⁰ *University of California Regents v. Bakke*, 438 U.S. at 317.

ter v. FCC, 447 F.2d 1201, 1214 n.38 (D.C. Cir. 1971); *Citizens Communications Center v. FCC*, 463 F.2d 822, 823 (D.C. Cir. 1972); *TV-9, Inc. v. FCC*, 495 F.2d at 937 n.28; see also *Garrett v. FCC*, 513 F.2d 1056, 1061 (D.C. Cir. 1975); *Minority Ownership of Broadcasting Facilities*, 68 F.C.C.2d 979, 981, 982 (1978).

Congress has also recognized the need for remedial measures to increase minority licensees of broadcast facilities. When it enacted the Communications Amendments Act of 1982, Pub. L. No. 97-259, 96 Stat. 1087, the Conference Committee stated:

The Conferees find that the effects of past inequities stemming from racial and ethnic discrimination have resulted in a severe underrepresentation of minorities in the media of mass communications. . . .²¹

One means of remedying the past economic disadvantage to minorities which has limited their entry into various sectors of the economy, including the media of mass communications, while promoting the primary communications policy objective of achieving a greater diversification of the media of mass communications, is to provide that a significant preference be awarded to minority-controlled applicants in FCC licensing proceedings for the media of mass communications. (Emphasis supplied).²²

Given its remedial nature, the FCC's use of the TV-9 preference clearly falls within the constitutional tests set

²¹ H. R. Conf. Rep. No. 765, 97th Cong., 2d Sess. 43, reprinted in 1982 U.S. Code Cong. & Ad. News 2261, 2287.

²² *Id.* at 44, 1982 U.S. Code Cong. & Ad. News at 2288.

forth in *Bakke* by Justice Powell²³ and by Justices Brennan, White, Marshall and Blackmun.²⁴ It also is a more flexible and less onerous remedial program than the set-aside program upheld in *Fullilove v. Klutznick*. Moreover, in light of the minority preferences contained in the lottery procedures promulgated in the Communications Amendments Act of 1982, *supra*, it can be said that Congress has added its imprimatur to the Commission's application of the TV-9 policy.²⁵ As a creature of Congress subject to judicial review, the FCC has properly drawn upon the wisdom of the Courts and the remedial powers of Congress in its efforts to increase the diversity of viewpoints expressed over the airwaves through the encour-

²³ Justice Powell's test is: (1) the purpose or interest is both constitutionally permissible and substantial; and (2) the classification is necessary to the accomplishment of the stated purpose. 438 U.S. at 305. Since the nature of the discrimination and its effects on ownership have been carefully documented, see for example, *Minority Ownership of Broadcasting Facilities*, 68 F.C.C.2d at 981, referencing, *Minority Ownership Task Force Report*, FCC, issued May 17, 1978 (see p. 3; Summary, p. 2), Justice Powell's concerns over "unidentified" societal discrimination would not apply in this case. 438 U.S. at 307-310.

²⁴ The test favored by Justices Brennan, White, Marshall and Blackmun is: (1) the purpose is to overcome "substantial, chronic minority underrepresentation where there is reason to believe the evil addressed is a product of past racial discrimination"; and (2) the program does not "stigmatize any discreet group or individual" and "race is reasonably used in light of the programs' objective." 438 U.S. at 366, 373-374.

²⁵ Congress' action is significant in light of Chief Justice Burger's position that Congress possesses greater remedial powers than do the courts to overcome the effects of past discrimination. *Fullilove v. Klutznick*, 448 U.S. at 483.

agement of minority ownership and operation of broadcast facilities.

2. The TV-9 Policy May Be Applied Without A Nexus Between The Minority Applicant And The Proposed Community Of License.

Finally, West Michigan argues that a *TV-9* merit cannot be awarded lawfully unless the population of the community to be served by the station contains the same kind of minority group members as the applicant receiving the merit:

And where, as in this case, a community has no stations, and no minority population, the race of its first broadcast station owner neither serves, nor indeed is even relevant to, the goal of diversity.²⁶

As the Court below found, however, the race of the owner is, *per se*, relevant to the overall public interest, convenience and necessity. Referring to the *TV-9* case, the Court said:

[T]he opinion clearly recognized that the goal of "increasing diversity of content, especially of opinion and viewpoint," whether for a locality or for the nation as a whole, was a vital part of the FCC's public interest mandate. (Citations omitted)²⁷

There is no doubt that the *TV-9* policy was founded in the concept of diversity and not in the concept of efficient local service. *TV-9, Inc. v. FCC*, 495 F.2d at 937, 938;

²⁶ West Michigan Petition at 9. As discussed earlier, West Michigan's recitation of the facts is incorrect. Hart has a significant minority population and the FM station will serve a larger area containing a substantial minority population. See pp. 7-9.

²⁷ *West Michigan Broadcasting Co. v. FCC*, 735 F.2d at 611.

WPIX, Inc., 68 F.C.C.2d at 411.²⁸ Logically, it is not the audience which determines whether a new voice is different from the rest—it is the speaker. Therefore, in the application of the *TV-9* policy, as in the case of all other decisional criteria in the selection process, the proper focus is on the applicants' characteristics and proposals. That is exactly what the Commission did when it selected Waters Broadcasting Corporation and that is precisely why the Court of Appeals affirmed the Commission.

CONCLUSION

The minority "plus" awarded to Waters was fully consistent with past decisions on the subject, both at the FCC and before the Courts. The procedure used was carefully designed to avoid placing nonminority applicants in an unfair position. In the context of the overall public interest, convenience and necessity, it is clear that the award of the Hart, Michigan FM construction permit to Nancy Waters was reasonable and lawful.

In short, this case presents none of the considerations which support review on certiorari. The federal circuits are not in conflict and, as detailed herein, the constitutionality of the plus awarded to Waters Broadcasting Corporation is not a valid issue and is therefore not an important question of federal law.

It is respectfully submitted that the Petition for Writ of Certiorari should be denied.

²⁸ See also *Radio Gaithersburg, Inc.*, 72 F.C.C.2d 820 (Rev. Bd. 1979), review denied, FCC 80-734, released December 11, 1980, *aff'd per curiam without opinion*, No. 81-1023, (D.C. Cir. October 19, 1981).

Respectfully submitted,
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